82-1294

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CLERK

CASE NO.

in the Supreme Court of the United States

AZTEC STEEL COMPANY, A.F.S.C.O., INC., ATLANTIC STEEL FABRICATORS, INC., and FAIRMONT STEEL CORPORATION,
Petitioners,

vs.

FLORIDA STEEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioners, AZTEC STEEL COMPANY, A.F.S.C.O., INC., ATLANTIC STEEL FABRICATORS, INC., and FAIRMONT STEEL CORPORATION, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above styled case on November 4, 1982.

QUESTION PRESENTED

The question presented is whether a Rule 37(b) sanction of dismissal may be used where there has been no actual failure to comply with any court order compelling discovery. More specifically, the issue is whether willful defiance warranting dismissal can be inferred from the provision of interrogatory answers which are perceived in part as substantively insufficient.

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OPINIONS BELOW

The opinion of the Court of Appeals in *Aztec Steel Company v. Florida Steel Corporation*, 691 F.2d 480 (11th Cir. 1982), appears in Appendix A hereto. The decisions and orders of the district court have not been reported officially, but appear in Appendices B and C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was rendered on November 4, 1982. This Petition for Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 37(a) and (b) of the Federal Rules of Civil Procedure is printed in Appendix D to the Petition.

STATEMENT

On December 11, 1975, ATLANTIC STEEL FABRICATORS, INC., A.F.S.C.O., INC., AZTEC STEEL CO., BAY STEEL COMPANY and FAIRMONT STEEL CORPORATION, all independent fabricators of reinforcing steel bars (rebar) filed suit against GEORGETOWN STEEL CO., FLORIDA STEEL COMPANY, LACLEDE STEEL COMPANY, OWEN STEEL COMPANY OF FLORIDA and BETHLEHEM STEEL CORPORATION, in the United States District Court for the Southern District of Florida.[1] Jurisdiction was invoked under 28 U.S.C. §1337.

On April 15, 1976, the action was transferred to the Middle District of Florida. Extensive discovery was commenced, initially by PETITIONERS and later by RESPONDENTS. Settlements were reached with GEORGETOWN and OWEN and these parties were dismissed by stipulation on April 11, 1977, and April 27, 1979, respectively.

The voluminous discovery leading to the judgment on appeal was filed by BETHELEM on April 29, 1977, and by LACLEDE on May 25, 1977. It consisted of in excess of 1200 interrogatory parts and subparts to each of the five PETITIONERS. PETITIONERS, after several stipulated extensions, filed answers to BETHELEHEM's and LACLEDE's interrogatories between October 26 and November 16, 1977.

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[1]The Plaintiffs/Appellants/Petitioners will be referred to herein as "PETITIONERS." The Defendants/Appellees will be referred to by name, *e.g.*, "FLORIDA", "BETHLEHEM", "LACLEDE", etc., or jointly as "RESPONDENTS".

On April 25, 1978, LACLEDE filed a Motion to Compel Answers to their interrogatories. On July 11, 1978, BETHLEHEM did likewise. On September 19, 1978, the court granted BETHLEHEM's Motion to Compel. On October 6, 1978, PETITIONERS filed their first Supplemental Answers to BETHLEHEM's interrogatories, and on October 24, 1978, PETITIONERS filed their First Supplemental Answers to LACLEDE's First Interrogatories.

On March 6, 1979, LACLEDE filed a Motion to Compel. On June 1 through June 8, 1979, BETHLEHEM filed Motions to Compel against PETITIONERS.

On November 25, 1979, the magistrate granted LACLEDE's and BETHLEHEM's motions and compelled PETITIONERS to supplement answers to the First Interrogatories. The PETITIONERS filed their Second Supplemental Answers to BETHLEHEM's and LACLEDE's First Interrogatories on January 15, 1980.

On March 10, 1980, BETHLEHEM filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 37(b)(2). On March 26, 1980, LACLEDE filed a similar motion. On March 28, 1980, FLORIDA joined the Motion to Dismiss of BETHLEHEM and LACLEDE. Prior to this "joinder" FLORIDA had been uninvolved in the discovery dispute.

On August 14, 1980, the magistrate recommended that the action be dismissed. On August 25, 1981, the district judge dismissed the action with prejudice. PETITIONERS were not afforded a hearing on the motion to dismiss before the district judge. In fact, the entire proceeding leading up to the dismissal with

prejudice (except for the Final Order) was held before a magistrate.

PETITIONERS appealed[2] from the Final Order dismissing their Complaint with prejudice to the United States Court of Appeals for the Eleventh Circuit. In its opinion rendered on November 4, 1982, the Court of Appeals affirmed, without allowing oral argument, the district court's order dismissing the action against FLORIDA even though FLORIDA had no discovery outstanding which had been the subject of any motion to compel.

REASONS FOR GRANTING THE WRIT

A. Conflict With Applicable Decisions of This Court

PETITIONERS submit that the Eleventh Circuit decided the case below in a manner which conflicts with applicable decisions of this Court. The court below based its decision upon *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). In doing so, the court found that the interrogatory answers of PETITIONERS which the magistrate and the trial court perceived to be substantively insufficient equaled a willful failure to comply with court orders. PETITIONERS suggest that the manner in which the lower court applied the *National Hockey League* case and its progeny is contrary to the purposes and intent evidenced in

[2]BAY STEEL COMPANY did not appeal. Additionally, on May 28, 1982, after an amicable settlement, the claims against BETHLEHEM and LACLEDE were dismissed by stipulation.

these decisions and in Fed.R.Civ.P. 37. *National Hockey League* neither envisions nor permits the imposition of the sanction of dismissal because the propounding party is dissatisfied with the substance of the responses. This harshest of sanctions is warranted only where the record demonstrates willful defiance of a court's orders.

The course of discovery in *National Hockey League* reveals certain essential facts which plainly distinguish it from the instant case:

National Hockey League	Instant Action
In response to interrogatories initially, there was no timely response and no timely filing of objections. In addition, there was no request for extensions of time.	PETITIONERS always filed objections and responses or received extensions in a timely manner.
In response to a court order requiring all objections to be filed by a certain date, most of the objections filed were general objections with a few specific references. In response to the court order requiring answers, the plaintiffs served a single unsigned, unsworn paragraph.	PETITIONERS made specific objections and filed specific sworn responses to the interrogatories.
No intervening supplementation of answers was provided, and the requested information was not available at the pre-trial conference date, requiring a continuation of the trial date.	PETITIONERS supplemented their responses several times and the trial date was never cancelled due to lack of response.

National Hockey League	Instant Action
In response to the second order requiring answers by March 11, 1974, no formal answers or motions for extensions of time were filed.	PETITIONERS never failed to comply with any order or to provide information which they possessed.
In a response to a motion for sanctions, which was denied, the court reset the trial again due to the plaintiffs' second breach of the pre-trial schedule set by the court.	PETITIONERS never violated a pre-trial schedule.
There was insufficient evidence elsewhere in the record to support any cause of action.	There are vast amounts of evidence in the record supporting the claims of PETITIONERS.
The defendants were prejudiced by the delays in discovery and the refusal to obey court orders compelling discovery because of the imminent trial date and the lack of additional discovery time to supplement information provided by interrogatory answers.	FLORIDA cannot demonstrate any prejudice, as it had no discovery outstanding which was subject to any motion to compel.
The final pre-trial order requiring additional answers to substantiate the plaintiffs' cause of action resulted in the filing of no response whatsoever by the plaintiffs.	PETITIONERS never failed to comply with any order to provide answers.

Thus, the plaintiffs in *National Hockey League* inflicted a great degree of prejudice upon the opposing

parties, failed utterly to obey numerous orders of the court, and concurrently failed to establish in the record any cause of action against the defendants. Such grievous behavior is totally lacking in the instant cause.

B. Conflict With Decisions of Other Circuit Courts of Appeals

The decision of the lower court conflicts with *Jones v. Louisiana State Bar Ass'n.*, 602 F.2d 94 (5th Cir. 1979); *Emerick v. Fenick Ind. Inc.*, 539 F.2d 1379 (5th Cir. 1976); and *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980). The circuit court relied upon *Jones* and *Emerick* in support of its decision. Rather than offer support for the sanction imposed by the lower court, these cases demonstrate the extreme behavior (absent in the instant cause) warranting dismissal as a sanction. *Marshall*, on the other hand was disregarded by the lower court even though the instant cause presents a fact pattern of the nature envisioned in that case.

In *Jones, supra*, the party sanctioned failed to appear or terminated early six depositions. In one of the depositions the plaintiff had revealed that she had aped telephone conservations and then made handwritten notes after speaking with a representative of the defendant. She agreed to produce the tapes and notes and then refused to do so. She was subsequently ordered by the court to produce the recording, the recorder and the notes and at that hearing she made no objection. On the day she was required to produce the materials, she filed a motion to quash the order. That same day at hearing, she was ordered again to produce the requested

materials within one hour, and was told by the judge that she could use that hour to confer with her attorney. Within the judge's hearing she told her attorney she would refuse to produce the materials and would use her hour to take her story to the press. She subsequently refused to produce the recording and the notes, and was consequently held in criminal contempt by the judge, as well as sanctioned by dismissal under Rule 37. The court found that her conduct was "deliberately obstructive." 602 F.2d at 94. Thus, the behavior that warranted sanction in that case was such behavior as also amounted to criminal contempt.

Emerick, supra, involved a failure to comply followed by an order compelling compliance followed by an additional failure to comply. The lower court again ordered compliance observing that the failure had been "unbelievably flagrant." 539 F.2d at 1380. Again the responding party failed properly to comply. The Fifth Circuit held:

> Nevertheless, when a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion.

Id. at 1381.

In sum, the two decisions relied upon by the lower court require a showing of flagrant bad faith far beyond the facts in this cause. These cases do not support the decision of the lower court.

In *Marshall, supra*, the defendant served nineteen interrogatories some three months after the suit was filed. The plaintiff timely answered but failed to respond to certain of the interrogatories, claiming that the omitted answers were being compiled but compliance was difficult. The defendant moved for the imposition of sanctions and the plaintiff provided cursory answers. The court denied the motion but ordered under Rule 37(a) that the plaintiff "fully and completely" answer the interrogatories within thirty days, stating that a failure to comply would upon request result in dismissal. On January 19, 1979, some four days late, plaintiff filed a one hundred page exhibit. In March 1979, the defendant moved to dismiss under Rule 37(b). The district court granted the motion with prejudice finding that the answers were over a year late and that plaintiff had acted in bad faith.

In reversing the dismissal the Fifth Circuit first acknowledged its cases where the supreme sanction had been utilized.[3] These cases all involved "extreme circumstances." *Id.* at 767. Alternatively, the court recognized that dismissal is too harsh a sanction in many cases stating that dismissal is to be sparingly used and only in situations where its deterrent value cannot be achieved by use of less drastic sanctions. *See, Griffin v. Aluminum Co. of America*, 564 F.2d 1171 (5th Cir. 1977). 621 F.2d at 768. The court further stated that whether the other party's preparation for trial is substantially prejudiced is a consideration. *See, Silas v. Sears, Roebuck & Co.*, 586 F.2d 382 (5th Cir. 1978). 621 F.2d at 768.

[3]Citing, *Emerick* and *Jones* among others.

By applying the facts before it to those principles the court concluded that dismissal was inappropriate. The court conceded that the order of the district court was not met; however, pointed out that a good faith partial compliance with the discovery request was made. The court found that the inadequate state of the defendant's records made it difficult for plaintiff to answer. The court also found it significant that the defendant was not prejudiced by the lack of compliance as no discovery cutoff had been scheduled. The court thus found that noncompliance was due to an inability to comply, and was not done in bad faith nor did it prejudice the defendant, hence the reversal.

In sum, the lower court was faced with facts warranting the application of *Marshall.* It responded by erroneously relying upon *Jones* and *Emerick.* Its decision therefore conflicts with all three cases.

C. Important Federal Question

The decision of the Eleventh Circuit in this case incorrectly resolved a question of federal law which has not been decided by this Honorable Court. The question presented is whether dismissal as a Rule 37 sanction is proper where interrogatory answers are found to be a constructive failure to obey a court order as opposed to a willful defiance of a court order. PETITIONERS urge that the court below erred in upholding the sanction of dismissal on facts which, at best, suggest a constructive failure to comply. PETITIONERS respectfully suggest that this Court should decide this question due to the paramount importance to all litigants.

The magistrate and district judge apparently perceived a willful disobedience on the part of PETITIONERS in reviewing the discovery responses. The order of the magistrate which was allegedly disregarded by PETITIONERS directed them to supplement interrogatory answers by providing complete answers. PETITIONERS responded with supplementation both times they were ordered to do so. The supplementation was provided in direct compliance with the magistrate's order.

It would appear the crux of the lower court's decision is this:

1. The magistrate was of the opinion that more information existed than had been disclosed in the interrogatory responses, rendering the responses substantively insufficient.

2. Because of his opinion regarding substantive insufficiency, the magistrate concluded that the answers provided were therefore evasive and incomplete.

3. Regarding these answers as incomplete, the magistrate therefore recommended that they be dealt with as though they were a refusal to comply with the court order.

4. Treating the answers, then, as a refusal, bad faith warranting dismissal was inferred.

There are at least two problems with this approach.

First, the specific authorization by which the court may treat what is perceived to be incomplete answers

as a failure to answer is contained within Rule 37(a) which authorizes the court to compel answers to discovery. The standard contained in Rule 37(b) authorizing sanctions for failure to comply with an order states:

> if a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just . . .

The provision in Rule 37(a) regarding an evasive or incomplete answer is by its own terms limited to the entry of an order to compel under subdivision (a). Rule 37(a)(3) states:

> *For purposes of this subdivision* an evasive or incomplete answer is to be treated as a failure to answer. (emphasis supplied)

Similar language authorizing sanctions to be based solely on interrogatory answers perceived as evasive or incomplete is simply not found in the subsection authorizing a sanction of dismissal for failure to comply with the court order. Subsection (b) of Rule 37 which allows the sanctions enumerated in paragraphs (A), (B) and (C) of subdivision (b)(2), does so for very specific behavior, including, "If a party . . . fails to obey an order to provide or permit discovery . . ." and Rule 37(b) was the precise basis of FLORIDA's motion to dismiss. The misinterpretation by the magistrate of Rule 37 is more significant when considered in light of the absence of any discovery on the part of FLORIDA which had been the subject of an order of court compelling discovery.

The importance to litigants of the question presented is manifest in the fact that the trial court's order of dismissal is actually a ruling on the merits of PETITIONERS' claims under the guise of a procedural sanction. Assuming any sanction was proper there obviously were other sanctions which could have been used by the lower court given the lack of any refusal or bad faith. It cannot reasonably be suggested that the answers regarding every claim of PETITIONERS were insufficient. Thus the trial court could have excluded evidence of certain claims (or even perhaps dismissed individual claims).

More properly, however, the lower court should have required motions going to the merits of the claims, e.g., motion for summary judgment. Such motions would have permitted a review of the entire voluminous record in this cause. Rather the decision of both the magistrate and the lower court proceeds from a perceived substantive insufficiency of some responses to an inference of willfulness. Substantive insufficiency is not evidence of actual incompleteness. Such a conclusion is based upon the magistrate's opinion regarding credibility as to completeness and in this case is clearly error.

To allow the quantum leap made by the magistrate would initiate a new realm of discretion on the part of the courts to dispose of cases on their merits without the traditional standards to safeguard against the preclusion of the right to proceed to trial by jury on the minimal showing of genuine issues of material fact.

PETITIONERS had produced ample evidence to substantiate a bona fide claim against FLORIDA. The dismissal disposed of significant claims on the merits under the guise of a procedural rule. A perception of incompleteness cannot be allowed to substitute for real evidence demonstrating defiance of a court order.

CONCLUSION

For the foregoing reasons, PETITIONERS respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI has been furnished, by mail, this ~~third~~ 2nd day of February, 1983, to RALPH DELL, ESQUIRE, Allen, Dell, Frank & Trinkle, Post Office Box 2111, 611 Marine Bank Building, Tampa, Florida 33601.

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APPENDIX "A"

AZTEC STEEL COMPANY, A. F. S. C. O., Inc., Atlantic Steel Fabricators, Inc., Fairmont Steel Corporation, etc., et al.,
Plaintiffs-Appellants,

v.

FLORIDA STEEL CORPORATION, et al.,
Defendants-Appellees.

No. 81-5961

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Nov. 4, 1982.

Plaintiff brought antitrust action. The United States District Court for the Middle District of Florida, George C. Carr, J., dismissed the suit for wilful failure to comply with court-ordered discovery, and plaintiff appealed. The Court of Appeals held that the district court did not abuse its discretion in dismissing antitrust action after finding that plaintiff had knowingly and wilfully failed to comply with court-ordered discovery

and that sanctions less severe than dismissal would be ineffective.

Affirmed.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

This case arises out of the dismissal under Fed.R.Civ.P. 37(b)(2) of appellant's antitrust action for willful failure to comply with court ordered discovery. We affirm.

In 1975 appellants Aztec Steel Company, A. F. S. C. O. Inc., Atlantic Steel Fabricators, Inc. and Fairmont Steel Corporation (hereinafter collectively referred to as Aztec) filed suit against Florida Steel Company, LaClede Steel Company and Bethlehem Steel Corporation.[1] Aztec charged the steel companies with a wide array of antitrust violations.

In 1977 both Bethlehem and LaClede served interrogatories on Aztec. Aztec's answers were both

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[1]In the original complaint Georgetown Steel Company and Owen Steel Company of Florida were included as defendants. Private settlements resulted in the dismissal of Georgetown and Owen in 1977.

evasive and incomplete. When Bethlehem and LaClede were unable to negotiate complete answers, they filed motions to compel. A magistrate granted the motions and Aztec eventually filed supplemental answers. Bethlehem and LaClede subsequently filed a second motion to compel, claiming that Aztec's answers remained inadequate. The magistrate granted the motion, and Aztec filed another set of supplemental answers. In 1980 Bethlehem and LaClede moved to dismiss, asserting that Aztec's answers to their interrogatories remained incomplete. Florida Steel filed a joinder to the dismissal motions.

In a hearing before the magistrate Aztec asserted for the first time it was unable to supply complete answers. The magistrate rejected Aztec's claims of good faith and found that it had willfully and knowingly failed to comply with the court's orders. The magistrate recommended that the action be dismissed.

The district court agreed that Aztec had willfully flouted court ordered discovery. The court noted that Aztec's "facile protestations of good faith are simply not borne out of the total record. To the contrary, [its] history of broken promises to Magistrate Game and [its] failure to provide the defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties." *Atlantic Steel Fabricators, Inc. v. Florida Steel Corporation*, No. 76-320 Civ-T-GC, op. at 3 (D.Fla. Aug. 25, 1981). After considering the inefficacy of lesser sanctions, the district court dismissed Aztec's claim against Bethlehem, LaClede and Florida Steel. Aztec subsequently settled with

Bethlehem and LaClede. From the dismissal in favor of Florida Steel, Aztec appeals.

[1-4] The standard review for a Rule 37(b) dismissal is not whether the reviewing court would, as an original matter, have dismissed the action; it is whether the district court abused its discretion in dismissing the action. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976). Dismissal will not be upheld if a party's failure to comply is due to inability rather than to willfullness, bad faith or disregard of responsibilities. *Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979).[2] When a party demonstrates a flagrant disregard for the court and the discovery process, however, dismissal is not an abuse of discretion. *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976). In reviewing the district court's ruling one consideration is whether a less drastic but equally effective remedy could have been fashioned. *Jones v. Louisiana State Bar Association*, 602 F.2d at 97. In the instant case the court found that Aztec knowingly and willfully failed to comply with court ordered discovery and that sanctions less severe than dismissal would be ineffective. We are unwilling to conclude that the district court abused its discretion.

[5] Aztec contends that the dismissal of its claims against Florida Steel was improper because Florida Steel did not propound any interrogatories. This argument disregards the institutional values Rule 37 is designed

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[2]Fifth Circuit cases handed down prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

to protect. Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. Aztec's contumacious conduct justified the district court's dismissal of the entire action. If we were to hold otherwise, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." *National Hockey League*, 427 U.S. at 643, 96 S.Ct. at 2781.

AFFIRMED.

APPENDIX "B"

[Received AUG 29 1980]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 76-320 Civ.T.-GC

ATLANTIC STEEL FABRICATORS, INC., etc., et al.,

Plaintiffs

vs.

FLORIDA STEEL CORPORATION, etc., et al,

Defendants

REPORT AND RECOMMENDATION

Before this Court are Defendant Bethlehem Steel Corporation's Motion to Dismiss pursuant to Fed.R.Civ.P. 37(b)(2), Motion of Laclede Steel Company to Dismiss, and Joinder of Florida Steel Corporation in Motions of Bethlehem and Laclede for Imposition of Sanctions against Plaintiffs. Upon consideration of the extensive memorandum submitted by the parties, the oral arguments of counsel and a review of the chronology of the progress of the discovery in this cause (see Exhibit "A" attached), I recommend that the Motions to Dismiss of the respective Defendants be granted.

Defendants Bethlehem Steel Corporation and Laclede Steel Company served interrogatories on Plaintiffs in April and May, 1977. It was not until five months later that any initial responses were received to these interrogatories, and these responses could be described as inadequate at best. Pursuant to the Local Rules, a meeting was held between counsel for Plaintiffs and Defendants in November, 1977, to discuss the sufficiency of Plaintiffs' responses and Plaintiffs' objections to the interrogatories. Despite assurances of the cooperation of counsel, it became necessary for Defendant Laclede to file a Motion to Compel in April, 1978, and Defendant Bethlehem to file a Motion to Compel in July, 1978, this Court granted Defendant Laclede's Motion to compel, and ordered Plaintiff to furnish responses not later than October 15, 1978. In a second order filed September 19, 1978, this Court granted Bethlehem's Motion to Compel, and ordered Plaintiff to respond to Defendant Bethlehem's interrogatories by November 1, 1978.

Plaintiff's second set of responses to the respective Defendants' interrogatories again proved to be inadequate, and Laclede filed a second Motion to Compel in March, 1979, while Bethlehem filed its second Motion to Compel in June, 1979. These motions were heard by this Court in June, 1979. On November 26, 1979, an order was entered granting each of the Defendants' Motions to Compel, and at the same time the Plaintiffs were admonished that "all parties plaintiff shall proceed expeditiously with the discovery, or the Court will consider imposition of sanctions provided for in Rule 37(b)(2)(c)."

Supplemental Responses were served on both Defendants in January, 1980, but these turned out to

be no more adequate than the previous responses had been. It was then that Defendants filed their individual Motions to Dismiss.

I find that Plaintiffs' repeated failures to comply with this Court's orders compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories are knowing and willful and represent intentional disregard to Plaintiffs' obligations to this Court and to the Defendants. This Court's imposition of the sanction of outright dismissal of the above styled cause for failure to comply with discovery orders is consistent with the position that:

> ". . . the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976).

Additionally, it is hereby recommended that Defendants be awarded their expenses, including attorneys' fees, incurred in connection with the preparation and filing of the motions which are the basis of this order.

This 14th day of August, 1980, at Tampa, Florida.

/s/Paul Game, Jr.
PAUL GAME, JR.
UNITED STATES MAGISTRATE

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(1) Complaint & Summons (12/15/75)			
(2) Amended Complaint (1/12/76)	28	28	—
(3) Bethlehem's First Interrogatories to Atlantic, AFSCO, Bay, Fairmont and Aztec (4/29/77)	472	500	0
(4) Stipulation for Extension of Time (Extension for Plaintiffs to Answer Bethlehem's Interrogatories to 9/1/77) (7/15/77)	77	577	77
(5) Plaintiffs' Answers and Objections to Bethlehem's First Set of Interrogatories (10/18/77-11/7/77)	115	692	192
(6) Plaintiffs' Conference Agreement to Supplement Interrogatories (11/11/77)	4	696	196
(7) Order Setting Discovery Cut-Off for 4/1/79 (1/31/78)	81	777	277
(8) Plaintiffs' Supplemental Answers to Bethlehem's First Set of Interrogatories (5/2/78-5/22/78)	111	888	388
(9) Motion & Memorandum of Bethlehem to Compel Discovery by Plaintiffs in Response to First Set of Interrogatories (7/19/78)	58	946	446

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS (Continued)

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(10) Order Compelling Plaintiffs' Production of Documents and Answers to Interrogatories (9/19/78)	62	1,008	508
(11) Plaintiffs' Answers and Supplemental Answers to Bethlehem's First Set of Interrogatories (11/2/78)	44	1,052	552
(12) Order Setting Discovery Cut-Off for 12/31/79 (2/15/79)	105	1,157	657
(13) Fairmont's Supplemental Answers to Bethlehem's First Set of Interrogatories (5/14/79)	88	1,245	745
(14) Defendant's Motion for Order Requiring Each Plaintiff to File a Detailed Statement of Its Theory of Impact, Damages & Means of Calculating Damages & Memorandum Supporting Same (6/6/79)	23	1,268	768
(15) Motions of Bethlehem Steel to Compel Plaintiffs to Answer Bethlehem's First Set of Interrogatories & For Sanctions, Including Award of Expenses (6/1/79-6/7/79)	1	1,269	769

"EXHIBIT A"—CHRONOLOGICAL CHART OF EVENTS
(Continued)

	Interval of Days Elapsed	Cumulative Days Elapsed Since Filing Complaint	Cumulative Days Elapsed Since Interrogatories Filed
(16) Hearing on Discovery Motions Before Judge Game (6/20/79)	13	1,282	782
(17) Order Granting Laclede's and BSC's Motion to Compel (11/26/79)	159	1,441	941
(18) Motion for Extension and Memorandum in Support Thereof (12/6/79)	10	1,451	951
(19) Order Granting Extension of Time (20 days) (12/11/79)	5	1,456	956
(20) Order Setting Indefinite Discovery Date (1/10/80)	30	1,486	986
(21) Plaintiffs' Second Supplemental Answers to Bethlehem's First Set of Interrogatories (1/15/80)	5	1,491	991
(22) Bethlehem's Motion to Dismiss Pursuant Rule 37(b)(2) Memorandum in Support Thereof (3/8/80)	53	1,544	1,044

APPENDIX "C"

[RECEIVED AUG 31 1981]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 76-320-Civ-T-GC

ATLANTIC STEEL FABRICATORS, INC., etc. et al.,

Plaintiffs,

vs.

FLORIDA STEEL CORPORATION, etc., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The defendants in this case have moved to dismiss pursuant to Fed.R.Civ.P. 37(b) because the plaintiffs have failed to produce court ordered discovery. The defendants' motions were referred to Magistrate Game who has filed a Report and Recommendation in which he recommends that the motions be granted. Based upon an independent review of the court file, the parties' memoranda, the proceedings before Magistrate Game, and the applicable law, I find that dismissal of this action is warranted. Accordingly, for reasons set out more fully below, the motions to dismiss are granted.

I.

The plaintiffs filed this action in 1975 charging the defendants with a wide array of anti-trust violations. In 1977, the defendants filed their first set of interrogatories. Five months later, the plaintiffs filed their answers to these interrogatories. When the defendants were unable to negotiate more complete answers to these interrogatories, they filed motions to compel. Magistrate Game granted the motions and the plaintiffs eventually filed supplemental answers. Thereupon the defendants filed new motions to compel, once again claiming that the filed answers were insufficient.

Significantly, the plaintiffs did not file any opposition to these motions. Rather, at a hearing before Magistrate Game they argued, as they had on previous occasions, that their failure had been due to their lack of funds and their inability to formulate—and pay for—a computer program to synthesize the discovery material. However, the plaintiffs did not assert that they could not answer the interrogatories without the aid of a computer. They merely stated that computerization would be a more efficient way to retrieve and synthesize the discovery material and, therefore, would be helpful to all parties. Consequently, they assured Magistrate Game that they could, and would, answer the interrogatories.

In an Order dated November 25, 1979, Magistrate Game granted the motions to compel and, finding that the filed answers were "evasive, incomplete and non-responsive," directed the plaintiffs to "fully, completely and with specificity" respond to the interrogatories.

Magistrate Game also specifically warned the plaintiffs that a failure to comply with the Order could result in Fed.R.Civ.P. 37(b)(2)(c) sanctions.

The plaintiffs filed supplements to their answers in January, 1980. Thereafter, the defendants filed the motions to dismiss which are presently before the Court. In support of these motions, the defendants argued that the plaintiffs' supplemental answers were inadequate and, thus, in violation of Magistrate Game's November 25th Order.

The plaintiffs have opposed the motions by arguing that their answers are as complete as they could be and that any insufficiency is due to their inability to supply fuller answers, not their disregard of their discovery responsibilities. In his Report and Recommendation which was issued after a hearing on the motions, Magistrate Game rejected the plaintiffs' claims of good faith and found that the plaintiffs' failures were "knowing and willful and represent[ed] intentional disregard to Plaintiffs obligations to this Court and to the Defendants."

This finding is amply supported by the record. Despite considerable out-of-court negotiation and numerous court orders, the plaintiffs have yet to file adequate answers to the defendants' *first* set of interrogatories. Instead, notwithstanding Magistrate Game's specific warnings, the plaintiffs have chosen to file stock answers to the interrogatories which, in large part, merely rehash answers that the magistrate found inadequate three years ago. Moreover, the plaintiffs have not shown why they cannot produce the basic

information that has been requested. Significantly, until they were faced with motions to dismiss, the plaintiffs had repeatedly promised Magistrate Game that they were able to, and would, answer the interrogatories in full and requested only that they be given more time to computerize the information. Consequently, the plaintiffs' recent assertion of an inability to comply is not persuasive.

In sum, the plaintiffs' facile protestations of good faith are simply not borne out by the total record. To the contrary, their history of broken promises to Magistrate Game and their failure to provide the defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties.

II.

Having determined that the plaintiffs willfully disobeyed court orders, the question becomes what sanction is appropriate. *See Marshall v. Segona*, 621 F.2d 763, 768-69 (5th Cir. 1980). Fed.R.C.P. 37(b) authorizes the imposition of sanctions "as are just." Among available sanctions, Rule 37(b)(2)(c) provides for an "order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Magistrate Game has recommended dismissal of this action as well as an award of expenses.

The Supreme Court has approved the imposition of dismissal as a sanction for failure to provide court

ordered discovery. *National Hockey League, et al v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam). Reasoning the Rule 37 sanctions serve not only to punish the recalcitrant party but also to deter others from similar behavior, the Court in *National Hockey League* held that Rule 37(b) dismissal of a private anti-trust action was appropriate where, as here, the plaintiffs' failures were found to be willful. Similarly, although the Fifth Circuit has been reluctant to impose the "draconian remedy of dismissal" in Rule 37(b) situations, *Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979), the Court has nonetheless affirmed dismissal in cases of willful disregard of court orders. *E.g., Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979). *See Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976).

On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective. The discovery requested is basic to the plaintiffs' case as well as the defendants' defense thereby making it impossible to isolate and strike out a portion of the pleadings to which the discovery is directed. In addition, the plaintiffs have been given ample opportunity to produce the information so that staying further proceedings would not be appropriate. Furthermore, as noted above, the plaintiffs have made no showing to substantiate their allegations of an inability to comply. Consequently, although dismissal is "the ultimate sanction", *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1173 n.3 (5th Cir. 1977), it is appropriate in this case to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by the magistrates of this Court.

For the same reasons, dismissal is appropriate as to all defendants and not just those who filed the interrogatories. Rule 37(b) sanctions are imposed for failures to comply with court orders. Accordingly, it is not fatal to the defendants' motions to dismiss that the plaintiffs are not technically in default with regard to Florida Steel. They are in default with regard to Magistrate Game's orders. *See generally Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977).

In addition to dismissal, Rule 37(b) allows for an award of expenses, including attorney's fees, caused by a party's failure to comply. The rules mandates such an award unless the failure was substantially justified or awarding expenses would be unjust. Thus, an award is not required merely because the sanction of dismissal has been imposed. *See* 8 Wright & Miller, Federal Practice and Procedure, §2284 (1970).

Although the plaintiffs' failures were not substantially justified, it nonetheless would be unjust to award expenses in this case. The most drastic sanction available to this Court—dismissal—has been imposed. It is difficult to see how awarding expenses in addition to dismissing the case would, in a qualitative sense, further sanction the plaintiffs' noncompliance or deter others from similar behavior. Moreover, it is significant that the plaintiffs are relatively small companies who have expended a considerable amount of money on this litigation. While the plaintiffs' comparative lack of resources is insufficient to excuse their noncompliance, it bolsters the conclusion that an award of expenses against these plaintiffs would not be just.

III.

Based on the foregoing, it is accordingly ordered that the defendants' Motions to Dismiss be GRANTED and that this action be dismissed with prejudice, each party bearing its own costs.

DONE AND ORDERED in Chambers in Tampa, Florida, this 25TH day of August, 1981.

/s/ George C Carr
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Fed.R.Civ.P. 37(a) and (b). Failure to Make or Cooperate in Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Office-Supreme Court, U.S.
FILED
MAR 2 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 82-1294

in the

Supreme Court

of the

United States

AZTEC STEEL COMPANY, A.F.S.C.O., INC.,
ATLANTIC STEEL FABRICATORS, INC.,
and FAIRMONT STEEL CORPORATION,
Petitioners,

vs.

FLORIDA STEEL CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

JURISDICTION

Respondent respectfully disagrees with the Petitioners' Question Presented, and any basis for Jurisdiction, in that the record reflects sufficient facts to show willfulness on the part of Petitioners in Petitioners' noncompliance with court orders.

The Question Presented is simply whether the District Court abused its discretion on August 25, 1981, by dismissing this action when, *after four hearings,* the Petitioners willfully refused to comply with explicit and unequivocal Court orders to fully and completely answer interrogatories served in May, 1977.

Note:
Petitioners were plaintiffs in trial court and appellants (sometimes called Aztec) on appeal. One plaintiff, Bay Steel Company, did not appeal.

Respondent, Florida Steel Corporation, together with Bethlehem Steel Corporation (Bethlehem), LaClede Steel Company (LaClede) were defendants in trial court and appellees on appeal. Bethlehem and LaClede amicably settled and were dismissed pending the appeal.

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STATEMENT

The omissions from Petitioners' statement are glaring.

The dismissal herein took place after extensive hearings, explicit directions of the Court with purported agreement by counsel for Petitioners, and a willful and intentional disregard by Petitioners of the explicit Court orders. The dismissal was for "willfully" disobeying Court orders.

As stated, suit was initially filed in December, 1975, and an amended Complaint was filed January 12, 1976. (I-19)

Even before the Amended Complaint, Petitioners filed interrogatories and requests for production to all Defendants. In April, 1976, Petitioners noticed depositions of personnel of Florida Steel as well as representatives of three of the four other Defendants. (I-43, 54, 64, 74-153, 175, 185; II-563, 566-9, 572, 576)

On May 18, 1976, in Petitioners' reply to Defendant Bethlehem's motion for a protective order as to the taking of the depositions of its personnel, the Petitioners advised the Court below that *"this truculent and unilateral action of BETHLEHEM is in direct contrast with that of the other Defendants who are proceeding on an amicable basis....* The other Defendants have agreed and are (1) answering interrogatories; (2) producing documents; (3) providing the requested deponents for depositions; (4) agreed to schedule depositions of nonparty or third party witnesses. Florida, for example, gave Notice of Withdrawal of Motion for Protective Order served April 30, 1976." (III-755)

On June 14, 1976, Petitioners deposed Mr. Gres, the Con-

References herein are to volumes of Record on Appeal before circuit court of appeals for the eleventh circuit.

troller of Florida Steel Corporation and began the deposition of Mr. Lewis, a Vice President of Florida Steel Corporation. (I-deposition transcripts)

Respondent Florida Steel was an active participant in all discovery.

On January 6, 1977, District Judge John A. Reed, Jr. wrote all counsel of record and requested that Petitioners' attorneys submit a proposed schedule for the completion of discovery. (IV-1085)

In February and March of 1977, the Petitioners served on Florida Steel and on the other Defendants, second, third and fourth interrogatories and second and third requests for production. (IV-1161-1232, 1293-1316)

In April, 1977, Defendant Bethlehem served extensive interrogatories and requests for production of documents upon all Petitioners. (VI-1749-1977)

In May, 1977, Defendant LaClede served extensive interrogatories and requests for production of documents upon all Petitioners. (VII-2286, 2319; VIII-2352-2479)

In June and July, 1977, Petitioners served fifth, sixth, seventh and eighth interrogatories on Defendants Florida Steel, LaClede, Owens Steel and Bethlehem. (X-3050-3394; XI-3397-3403)

During November of 1977, Petitioners filed answers and objections to the interrogatories submitted by Defendants Bethlehem and LaClede. Most of the responses by the Petitioners were objections to the effect that the Petitioner "should not be required to permanently fix its contentions concerning the activities of the Defendants in this case until it has had an

opportunity to do merit discovery. Most of the factual information sought in this Interrogatory is in the possession of the Defendants. Some of the factual information must be sifted from the Defendants' documents. Atlantic has not received production of most of the documentation requested in its Rule 34 requests and merit discovery is in its incipient stages. Therefore, Atlantic is without adequate information to answer this Interrogatory and objects, under Rule 33(b) of the Federal Rules of Civil Procedure, to responding at this stage of the litigation." (XII-3853-4068; XIII-4148-4202)

On January 31, 1978, District Judge Reed ordered all discovery completed by April 1, 1979. (XIII-4386)

On April 25, 1978, Defendant LaClede filed a motion to compel answers to its first interrogatories. (XIV-4597)

In their May 8, 1978 response to that motion, Petitioners admitted they had agreed to provide supplemental answers but requested from the Court additional time in which to do so. (XV-4710)

On June 16, 1978, the Honorable Paul Game, Jr., United States Magistrate, entered an order granting Defendant LaClede's motion to compel the Petitioners to provide more complete responses to LaClede's first set of interrogatories. That order reflects that counsel for Petitioners advised the Court that "the Plaintiff Atlantic Steel Fabricators, Inc. (hereinafter 'Atlantic') has established a computer program for compiling the information necessary to fully answer the interrogatories. An average of one to five people worked continuously from the fall, 1977, until approximately February, 1978, gathering the necessary information for use in the computer program. Since approximately February, 1978, until the present, five individuals have worked continuously and exclusively on this project. To date approximately two-thirds (2/3) of the pertinent informa-

tion has been compiled. Atlantic anticipates having all such information compiled and complete answers to LaClede's interrogatories prepared no later than October 15, 1978. Atlantic asserts that earlier completion is physically impossible due to the sheer volume of materials which must be assimilated before intelligent and complete answers to interrogatories can be furnished..... *All parties* have postponed taking oral depositions, pending final compilation of the data required for Atlantic to respond to interrogatories in question." (Emphasis added) (XV-4749-50)

On July 11, 1978 Defendant Bethlehem served a motion to compel answers to its first interrogatories. (XV-4751)

On September 18, 1978, a hearing on Bethlehem's motion was held before Magistrate Game. *At that hearing, after Petitioners' counsel advised the Court that the Petitioners would be able to provide answers by November 1, 1978, the following dialogue occurred:*

> The Court: "We will grant your request that you be given until November 1st to answer those; and make that a part of the same order.
>
> What about your computer business? Is that working out?"
>
> Mr. Arnold: "Yes, Your Honor, it has. We have got the data working and are starting to get the information back. It seems actually to be working." (Tr. 22).
>
> The Court: "Is there anything else we need to attend to now? You anticipate meeting these dates?"
>
> Mr. Arnold: "Yes, Your Honor, we do." (Tr. 23-24)

By order dated September 19, 1978, the Court granted Bethlehem's motion to compel and directed Petitioners to respond by November 1, 1978. (XV-4881)

In October and November, 1978, Petitioners filed supplemental answers in response to the two Court orders compelling responses. The various Petitioners' answers were predicated with the qualification that "in the course of future discovery, the Plaintiff expects to receive the additional documentation and pre-trial testimony which will complete the gaps in these answers." (Vol 2, Separate Folder)

On February 15, 1979, Judge Reed entered an order requiring all discovery to be completed by December 31, 1979. (XVI-4965)

In March, 1979, LaClede moved again to compel answers to its first interrogatories. (XVI-4966, 5012; XVII-5072-5193)

On April 3, 1979, the Petitioners filed memoranda in opposition to LaClede's motions to compel. The substance of these memoranda was that, contrary to their earlier promises to the Court, the Petitioners had provided all of the information they intended to provide. (XVII-5261, 5304, 5347; XVIII-5378)

Because of the new position taken by Petitioners, on June 6, 1979, Defendants Florida Steel, Bethlehem and LaClede filed a motion for an order requiring each Petitioner to file a detailed statement of its theory of impact, damages, and means of calculating damages. The memorandum in support of that motion recited that the order was "patently necessary because of Plaintiffs' egregious failures and refusals to respond to Defendants' numerous attempts to discover their theory of impact, theory of damage and a means of calculating their putative damages." (XVIII-5724)

Also in June, 1979, Bethlehem again moved for an order compelling answers to its first interrogatories. (XVIII-5524; XIX-5740, 5940, 6127; XX-6335)

The hearing on the LaClede and Bethlehem motions to compel *and* the motion of Florida Steel, LaClede and Bethlehem for an impact and damage summary was held on June 20, 1979. Counsel for the Petitioners and Magistrate Game had the following discussions:

> Mr. Womack: "We are now in the process of putting onto a computer program all of the files, which we call the contract files in the depositions and the testimony that we have in our possession for all four Plaintiffs."
>
> Mr. Womack: "Well, the truth of the matter is, Your Honor, *we were litigated out of money*. The economist stopped work on it, and the computer program stopped dead in the water. For months no work was done.
>
> We have now paid the economist up to date. He is back on the job, and the computer program is going forward."
>
> The Court: "Well, what's the bottom line?"
>
> Mr. Womack: "6/29/79 is the date that the ladies who are entering the data tell me that all the contracts will be on. The next estimate is two - correction, three to four weeks.
>
> • • • •
>
> It then goes to the economist, obviously. The minute it is available it will also go to the Defendants for review by their experts and their economists."
>
> The Court: "What you're saying is, you don't know what your proof in the case is yet. Is that what you are telling the Court?"
>
> Mr. Womack: "Essentially, Your Honor, I do not know." (Tr. 26-27)
>
> • • • •

The Court: "I don't think that parties to litigation should sit around waiting for money problems unless it's called to the Court's attention and you ask for some sort of extension in discovery and everything else and the Court is given an opportunity to consider that.

* * * *

You were just under an order to do certain things *based upon a representation that you made to the Court - your client was.*

* * * *

Well, what's the bottom line? When are they going to be able to discover your case?"

Mr. Womack: "October, which is - what? Six months. (Tr. 30).

* * * *

My information, the best information I have, if Your Honor please, is that this computer data will be ready and checked for trustworthiness and delivered to the economist in late August or early September.

Now, if he will work on it and if he can form his conclusions, we will submit them the minute he does." (Tr. 32).

* * * *

The Court: "Do you have the money to complete this case and go forward with it?"

Mr. Womack: "We have received some funds from a recent settlement with one of the Defendants, and those monies are being used exclusively for this purpose."

The Court: "Do you have sufficient - are you going to come back later and say you have run out of money again, or are you prepared to go forward with it?"

Mr. Womack: "Your Honor, if you will give us a day in court, we're going to try the case on what

dollars we have now. It may be less well prepared than we would like, but we're going with what we've got." (Tr. 34-35). (Emphasis added)

During the summer of 1979, numerous depositions were held. (Depositions, Vol. 2).

In October, 1979, the Petitioners deposed Mr. Flom, then President of Florida Steel, Mr. Haney, Vice President of Florida Steel, Mr. Hunsberger, Mr. Lewis, Mr. Flores and Mr. Wolf, all officers or former officers or managers of Florida Steel. (Depositions Vol. 2 and 3)

On November 26, 1979, Magistrate Game entered an order granting both LaClede's and Bethlehem's motions to compel answers for their first interrogatories. The court stated "that in light of the disposition of Defendants' motions to compel, Defendants' Motion for Order Requiring Each Plaintiff to File a Detailed Statement of Its Theory of Impact, Damages and Means of Calculating Damages is DENIED."

The Court further ordered all Petitioners to proceed expeditiously with discovery *or "the Court will consider the imposition of sanctions* provided for in Rule 37(b)(2)(C)." (emphasis added) (XXI-6584)

On January 10, 1980, the Court continued the pre-trial and trial until further order. (XXI-6597)

Thus, Respondent Florida Steel's Motion for Statement of Impact and Damages was *denied* because the Petitioners were ordered to answer the interrogatories and warned that sanctions would be forthcoming if they did not. (XXI-6584)

On January 15, 1980, the Petitioners filed second supplemental answers to LaClede's and Bethlehem's first interrogatories. (XXI-6598; XXII-7000; XXIII-7441)

In March, 1980, Bethlehem and LaClede filed motions to dismiss the Amended Complaint in accordance with Fed.R.Civ.P. 37(b)(2)(C). (XXIII-7588, 7730)

On March 27, 1980, Florida Steel filed a joinder in the motions to dismiss filed by Bethlehem and LaClede. (XXIII-7751) On April 7, 1980, Petitioners filed a memorandum in response to Florida Steel's joinder in which it asserted that Florida Steel had made no allegation that the Petitioners had failed to comply with "any discovery propounded by Florida Steel." (XXIV-7832)

On April 29, 1980, a hearing on the motions to dismiss was held before Magistrate Game.

On August 14, 1980, Magistrate Game issued a Report and Recommendation in which was specifically recited that before the Court were the motions to dismiss of Bethlehem and LaClede and the joinder of Florida Steel Corporation in those motions. Magistrate Game recited that after consideration of all of the matters that he found "that Plaintiffs' repeated failures *to comply with this Court's orders* compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories are knowing and willful and represent intentional disregard to *Plaintiffs' obligations to this Court* and to the Defendants." (Emphasis added) (XXIV-7860, 7861)

In addition, Magistrate Game recommended that the Defendants be awarded their expenses including reasonable attorneys' fees. (XXIV-7861)

Thereafter, after extensive briefs, the Honorable George C. Carr, the Judge to whom the case had been assigned from Judge Reed, entered Memorandum Opinion and Order on August 25, 1981 dismissing the case with prejudice but refusing to award Defendants' reasonable attorneys' fees and costs because the

Court believed that the sanction of dismissal was the ultimate sanction. Judge Carr determined that the Plaintiffs had "willfully" disobeyed court orders.

Judge Carr noted that Petitioners' "facile protestations of good faith are simply not borne out of the total record. To the contrary, [their] history of broken promises to Magistrate Game and [their] failure to provide the Defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties." (XXIV-8137-8139)

On appeal, the United States Court of Appeals, Eleventh Circuit, Affirmed, stating in part (referring to Petitioners as AZTEC, one of Petitioners):

> "[1-4] The standard review for a Rule 37(b) dismissal is not whether the reviewing court would, as an original matter, have dismissed the action; it is whether the district court abused its discretion in dismissing the action.
>
> * * * *
>
> In the instant case the court found that Aztec knowingly and willfully failed to comply with court ordered discovery and that sanctions less severe than dismissal would be ineffective. We are unwilling to conclude that the district court abused its discretion.
>
> * * * *
>
> Rule 37 sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. Aztec's contumacious conduct justified the district court's dismissal of the entire action. If we were to hold otherwise, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." *National Hockey League,* 427 U.S. at 643, 96 S.Ct. at 2781." (Petitioners' Appendix A)

THE REASONS FOR GRANTING THE WRIT asserted:

A. CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT
B. CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS
C. IMPORTANT FEDERAL QUESTION

completely fail.

SUMMARY OF ARGUMENT

The actions of the Magistrate (Petitioners' Appendix B) and of the District Judge (Petitioners' Appendix C) were taken only after four hearings and several years and upon Petitioners' willful refusal to comply with explicit and unequivocal Court orders, in conformity with this Court's decision in *National Hockey League v. Metropolitan Hockey Club, supra,* as well as in conformity with decisions of other Circuit Courts of Appeal including decisions of the *Fifth Circuit,* of which the Eleventh Circuit was formerly a part. As the District Judge stated: "On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective."

There is no abuse of discretion.

ARGUMENT

Petitioners assert that the record below does not demonstrate willful defiance of court orders. Respondent respectfully submits that the Magistrate's Report and Recommendation and Judge Carr's Memorandum Opinion and Order and the Opinion of the Eleventh Circuit more than adequately demonstrate the willful defiance present in this case.

The record reveals a series of inconsistent and contradictory

positions and representations to the Court on the part of the Petitioners which support a finding of willfulness.

All parties were involved in extensive discovery during the pendency of the action beginning in 1976.

The specific interrogatories at issue were propounded in April and May, 1977.

Petitioners in May, 1977, advised they were engaged in a "cooperative project (with other Plaintiffs) through which voluminous transactional information would be computerized and used in this case."

In response to LaClede's April 25, 1978, Motion to Compel and at a time when the court-ordered discovery cut-off date was then April 1, 1979, the Petitioners represented to the Court on May 8, 1978, that they "agreed to provide the supplemental responses."

When Magistrate Game entered the June 16, 1978, Order compelling answers to LaClede's first Interrogatories, he specifically recited the unequivocal representations by Petitioners' counsel *to the court* that "a computer program for compiling the information necessary to fully answer the interrogatories" had been set up and that Petitioners expected to be in a position to provide those answers by October 15, 1978.

Importantly, Magistrate Game noted that "all parties" have postponed depositions pending receipt of those answers.

On July 11, 1978, Bethlehem filed its motion to compel.

On September 18, 1978, Magistrate Game inquired of Petitioners' counsel about "your computer business? Is that working out?"

Petitioners' counsel replied: "Yes, Your Honor, it has. We have got the data working and are starting to get the information back. It seems actually to be working."

Based on those representations *to the Court,* the Court entered the September 19, 1978, order compelling answers to Bethlehem's first set of interrogatories by November 1, 1978.

In October and November, 1978, *purporting* to comply with the two orders, Petitioners filed supplemental answers which were nonresponsive and essentially reflected the same position previously taken: answers will be given when discovery is completed.

On February 15, 1979, Judge Reed ordered all discovery completed by December 31, 1979.

On March 3, 1979, LaClede *again* moved to compel answers to its first set of interrogatories.

In Petitioners' memoranda of April 3, 1979, in response to LaClede's motion, the Petitioners changed their position. No more was theirs a plea for more time. No reference is made to the then legendary computer program but, instead, the thrust of the response was that Petitioners had provided the best answers they could. For example, with regard to LaClede Interrogatory 45, a critical one asking for basic damage information, the Appellants said:

> "The economists who had been hired by the Plaintiff to formulate the damage study are not in a position to answer this Interrogatory at this time. As with the rest of LACLEDE's Motion to Compel, it continues to insist that the Plaintiff provide it with information which it does not possess." (XVII-5351)

The response by Petitioners to the effect that no other

answers would be provided, prompted Florida Steel, Bethlehem and LaClede to file the June 6, 1979, motion for an impact and damage study - that is, to require Petitioners to, *at a minimum,* provide definitive information on how they were allegedly affected by actions of Defendants and to what monetary extent.

Also in June, 1979, Bethlehem *again* moved to compel answers to its first interrogatories.

The inference that the dismissal should be reversed because the remaining Respondent Florida Steel never served interrogatories is a "red herring" at best. The Amended Complaint was dismissed because Petitioners refused to abide by *Court Orders,* but contrary to Petitioners' less than candid assertion that Florida Steel did not participate in discovery, Florida Steel fully participated. It also was fully entitled to use the Petitioners' answers to the sets of interrogatories in question. *Fidelity & Deposit Company of Maryland v. Hudson United Bank,* 653 F.2d 766,777 (3rd Cir. 1981); *Giaraffa v. Moore-McCormack Lines, Inc.,* 270 F.Supp. 342, 348-49 (S.D.N.Y. 1967); *Ohio Valley Electric Corp. v. General Electric Co.,* 244 F.Supp. 914, 954 (S.D.N.Y. 1965).

It was because of Florida Steel's involvement and direct interest in the answers for which it had been long waiting that it joined in the motion for an impact and damage study in June, 1979.

At the hearing on the motions to compel and for an impact and damage study, the Petitioners *once again resurrected the computer program.* Incredibly, they admitted it had been voluntarily discontinued because the Petitioners ran out of money. Yet never did the Petitioner seek relief from the orders.

> The Court: "What's the status of that? It seems to me you told me that was going to be completed sometime in the—"

Mr. Womack: "Well, the truth of the matter is, Your Honor, we were litigated out of money. The economist stopped work on it, and the computer program stopped dead in the water. For months no work was done.

We have now paid the economist up to date. He is back on the job, and the computer program is going forward."

The Court: "Well, what's the bottom line?"

Mr. Womack: "6/29/79 is the date that the ladies who are entering the data tell me that all the contracts will be on. The next estimate is two - correction, three to four weeks.

* * * *

The Court: "What you're saying is, you don't know what your proof in the case is yet. Is that what you are telling the Court?"

Mr. Womack: "Essentially, Your Honor, I do not know." (Tr. 26-27).

* * * *

The Court: "I don't think that parties to litigation should sit around waiting for money problems *unless it's called to the Court's attention and you ask for some sort of extension in discovery and everything else and the Court is given an opportunity to consider that.* (emphasis added)

You were just under an order to do certain things based upon a representation that you made to the Court - your client was.

* * * *

Well, what's the bottom line? When are they going to be able to discover your case?"

Mr. Womack: "October, which is - what? Six months. (Tr. 30).

* * * *

The Court: "Do you have the money to complete this case and go forward with it?"

Mr. Womack: "We have received some funds from a recent settlement with one of the Defendants, and those monies are being used exclusively for this purpose."

The Court: "Do you have sufficient - are you going to come back later and say you have run out of money again, or are you prepared to go forward with it?"

Mr. Womack: "Your Honor, if you will give us a day in court, we're going to try the case on what dollars we have now. It may be less well prepared than we would like, but we're going with what we've got." (Tr. 34-35).

By its November 26, 1979, Order, the Court once again granted the motions to compel answer to the *first* interrogatories, now over two years having elapsed since being filed, the Court specifically found "that the answers are evasive, incomplete and non-responsive." A review of the same certainly bears that out. (XXI-6582)

The Court ordered Petitioners to "fully, completely and with specificity" answer the same two first sets of interrogatories. (XXI-6583)

The Court denied the motion for an impact and damage study "in light of its ordering the answers to interrogatories." (XXI-6584) (The information would come to the Defendants, including Florida Steel, through the answers to the interrogatories.)

The Court specifically cautioned the Petitioners to "proceed expeditiously with the discovery, or the Court will

consider the imposition of sanctions provided for in Rule 37(b)(2)(C)." (emphasis added) (XXI-6584)

On January 15, 1980, the Petitioners filed Second Supplemental Answers in response to the Court Orders and warnings as to sanctions. (XXII-7130)

The answers were unresponsive, evasive and no more adequate than the previous answers.

In March, 1980, Florida Steel, Bethlehem and LaClede moved the Court to dismiss the Petitioners' Amended Complaint in accordance with Fed.R.Civ.P. 37(b)(2)(C).

On April 29, 1980, a hearing on the Motions to Dismiss was held before Magistrate Game.

On August 14, 1980, Magistrate Game issued his Report and Recommendation to the effect that the Amended Complaint be dismissed with prejudice and that attorneys' fees be taxed against Petitioners.

Magistrate Game found "that Plaintiffs' repeated failures to comply with this Court's orders compelling Plaintiffs to provide full and complete answers to Defendants' interrogatories *are knowing and willful and represent intentional disregard* to Plaintiffs' obligations *to this Court* and to the Defendants." (Emphasis added.)

Extensive responses to the Report and Recommendation were filed by Petitioners and Defendants. Yet *at no time* between August 14, 1980, and August 25, 1981, the date of Judge Carr's dismissal order, *did Petitioners make any attempt to comply with, or seek relief from, the Court's orders.*

Judge Carr *found that willfulness was established* by the record:

> "This finding is amply supported by the record. Despite considerable out-of-court negotiation and numerous court orders, the plaintiffs have yet to file adequate answers to the defendants' first set of interrogatories. Instead, notwithstanding Magistrate Game's specific warnings, the plaintiffs have chosen to file stock answers to the interrogatories which, in large part, merely rehash answers that the magistrate found inadequate *three* years ago. Moreover, the plaintiffs have not shown why they cannot produce the basic information that has been requested. Significantly, until they were faced with motions to dismiss, the plaintiffs had repeatedly promised Magistrate Game that they were able to, and would, answer the interrogatories in full and requested only that they be given more time to computerize the information. Consequently, the plaintiffs' recent assertion of an inability to comply is not persuasive.
>
> In sum, the plaintiffs' facile protestations of good faith are simply not borne out by the total record. To the contrary, their history of broken promises to Magistrate Game and their failure to provide to defendants with basic information in the six years this case has been pending evidence a willful disregard for the Court, the discovery process, and the opposing parties.
>
> * * * *
>
> On the facts of this case, it is difficult to see how a less severe sanction than dismissal would be effective. The discovery requested is basic to the plaintiffs' case as well as the defendants' defense thereby making it impossible to isolate and strike out a portion of the pleadings to which the discovery is directed. In addition, the plaintiffs has been given ample opportunity to produce the information so that staying further proceedings would not be appropriate. Furthermore, as noted above, the plaintiffs have made no showing

to substantiate their allegations of an inability to comply. Consequently, although dismissal is "the ultimate sanction," *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1173 n. 3 (5th Cir. 1977), it is appropriate in this case to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by the magistrates and this Court.

For the same reasons, dismissal is appropriate as to all defendants and not just those who filed the interrogatories. Rule 37(b) sanctions are imposed for failures to comply with court orders. Accordingly, it is not fatal to the defendants' motions to dismiss that the plaintiffs are not technically in default with regard to Florida Steel. They are in default with regard to Magistrate Game's orders. *See generally Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236 (8th Cir. 1977)." Petitioners' Appendix C (emphasis added)

The Magistrate, the District Judge and the Circuit Court of Appeals found this case precisely in conformity with this Court's decision in *National Hockey League v. Metro Hockey Club, supra,* in which crucial interrogatories remained unanswered after *17 months* despite extensions, admonitions of the court and promises of the plaintiffs. The court, *upon* consideration of the full record, found that the plaintiffs "willfully disobeyed court orders," ... "have been given ample opportunity to produce information" and "have made no showing to substantiate their allegations of inability to comply." "Consequently, ... the ultimate sanction ... is appropriate to insure the integrity of the discovery process and to deter others from disregarding discovery orders issued by magistrates of this Court."

As the United States Supreme Court observed in *National Hockey League v. Metro Hockey Club, supra:*

"The question, of course, is not whether this

Court, or whether the Court of Appeals, would as an original matter have dismissed the action, it is whether the District Court abused its discretion in so doing. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil §2284 p 765 (1970); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F2d 1204, 1211 (CA8, 1973); *Baker v. F & F Investment*, 470 F2d 778, 781 (CA2, 1972).

* * * *

There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the District Court.

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." 427 U.S. at 642.

Petitioners urge conflict with the decisions of *Jones v. Louisiana Bar Ass'n*, 602 F.2d 94 (5th Cir. 1979), in which there was a refusal to obey a court order deemed by the trial court to be "deliberately obstructive" and the sanction of dismissal was imposed. The Circuit Court of Appeals in the instant case noted

the *Jones* decision and that "dismissal will not be upheld if a party's failure to comply is due to inability rather than wilfullness, bad faith or disregard."

The Circuit Court of Appeals found in this case as in *Jones*, that "when a party demonstrates a flagrant disregard for the Court and the discovery process, however, dismissal is not an abuse of discretion.

The case of *Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976), cited as conflicting with the instant decision, involved a far shorter time period: there was a failure to comply with interrogatories filed in January and February, 1975; order to compel on June 5, 1975; order on July 15, 1975, to comply in five (5) days; partial compliance; an order on October 17, 1975, to comply; and dismissal on November 24, 1975. The contention again was inability to comply, but the District Court found the disregard of the orders "unbelievably flagrant." There the Appellate Court stated at 1381:

> "... It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction. It is our responsibility solely to decide whether the district court could, in its discretion, have determined the appellant's conduct to be so flagrant as to justify striking its pleadings. In the case at bar, the district court's findings that the appellant was in 'flagrant disregard' of the court's orders finds support in the record. We cannot say the district court abused its discretion."

Finally, Petitioners urge conflict with *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980) as presenting a fact pattern of the envisioned in this case. There is no similarity whatever. There was:

> "four day noncompliance ... caused by the good faith, sincere, but mistaken interpretation of the correct deadline of the District Court's order" (p. 768)

and the Court further noted that no discovery cut-off was even scheduled until a much later date.

In the instant case, there was a history of broken promises over several years, an utter disregard for court orders and a finding of "knowing and willful ... intentional disregard of Plaintiffs' obligations to the Court and to the Defendants." Petitioners' Appendix C.

The Circuit Court of Appeals, Eleventh Circuit, therefore, found Petitioners' "contumacious conduct" justified the district court's dismissal of the entire action.

CONCLUSION

The lower court did not abuse its discretion and the affirmance of the dismissal by the Circuit Court of Appeals for the Eleventh Circuit, does not conflict with decisions of this Court or of the other Circuit Courts of Appeals.

The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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and

By: _____
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been furnished by U.S. Mail this 1st day of March, 1983, to R. BENJAMINE REID, ESQUIRE, Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern, P.A., Suite 900, Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131, Attorneys for Petitioners.

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